Nos. 76-105 and 76-141

In the Supreme Court of the United States

OCTOBER TERM, 1976

FAITH HOSPITAL ASSOCIATION, PETITIONER

v.

BLUE CROSS HOSPITAL SERVICE, INC. OF ST. LOUIS, ET AL.

ST. LOUIS UNIVERSITY, PETITIONER

v.

BLUE CROSS HOSPITAL SERVICE, INC. OF ST. LOUIS, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court in No. 76-105 (Pet. App. 21-23) is reported at 393 F. Supp. 601. The opinion of the court of appeals in No. 76-105 (Pet. App. 1-2) is reported at 537 F. 2d 294. The opinion of the district court in No. 76-141 (Pet. App. 1-8) is reported at 393 F. Supp. 367. The opinion of the court of appeals in No. 76-141 (Pet. App. 9-28) is reported at 537 F. 2d 283.

JURISDICTION

The judgments of the court of appeals in Nos. 76-105 and 76-141 were entered on April 12, 1976. A joint petition for rehearing was denied on May 4, 1976 (No. 76-141, Pet. App. 29). The petition for a writ of certiorari in No. 76-105 was filed on July 26, 1976. The petition in No. 76-141 was filed on August 2, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 42 U.S.C. 405(h) precludes judicial review of nonconstitutional issues arising under the Medicare Act, 79 Stat. 291, as amended, 42 U.S.C. (and Supp. V) 1395 *et seq.*, relating to years prior to fiscal year 1973.

STATUTES INVOLVED

The pertinent statutory provisions are set forth at pages 3 and 4 of the petition in No. 76-105.

STATEMENT

Part A of the Medicare Act, 79 Stat. 291, as amended, 42 U.S.C. (and Supp. V) 1395c to 1395i-2, is designed to provide basic protection against the costs of hospital services for eligible individuals aged 65 and over. 42 U.S.C. (Supp. V) 1395c. Participating hospitals—the providers of services paid for by the Medicare program—are reimbursed for their costs from a federal trust fund administered by the Secretary of Health, Education, and Welfare. 42 U.S.C. (and Supp. V) 1395i. "Fiscal intermediaries" such as the Blue Cross Association typically handle the day-to-day administration of the program, auditing the providers and making payment as agent for the Secretary. 42 U.S.C. (and Supp. V) 1395h.

Part B of the Act, 79 Stat. 301, as amended, 42 U.S.C. (and Supp. V) 1395j-1395w, insofar as is relevant here, establishes a voluntary insurance program for elderly individuals covering part of the cost of certain physicians' services. See *Mathews* v. *Diaz*, No. 73-1046, decided June 1, 1976, slip op. 2 n. 1. Under the program, the Secretary may make payment directly to the individual beneficiary, to the physician, or, when the services are rendered in a hospital, to the hospital itself. 42 U.S.C. (and Supp. V) 1395*l* and n.

1. Petitioners are providers under Part A of the Act. They also receive payments under Part B of the Act, however, in return for in-hospital services performed by physicians who are affiliated with (and,

in the case of petitioner St. Louis University, salaried by) the hospital itself. During the course of petitioners' participation in the program, Blue Cross Association (the fiscal intermediary for both petitioners), through its affiliate Blue Cross Plan of St. Louis, determined that for several fiscal years before 1973 petitioners had requested and received payments under Part B in excess of those to which they were entitled under the Act and regulations promulgated thereunder. Blue Cross Plan advised petitioners that payment for such services would no longer be made and demanded that the amounts overpaid during the years in question be repaid to the Secretary.

Both petitioners appealed to the Provider Appeals Committee (established pursuant to the agreement between Blue Cross Association and the Secretary authorizing Blue Cross Association to act as an intermediary). The Committee upheld the determination of Blue Cross Plan that petitioners had overcharged the Secretary.

Petitioners thereupon brought separate actions in the United States District Court for the Eastern District of Missouri, claiming (1) that Blue Cross Plan and Blue Cross Association had misinterpreted the Act and the applicable regulations in determining that petitioners had been overpaid by the Secretary and (2) that the composition of the Appeals Committee (three of whose five members are representatives of and appointed by the president of Blue Cross

Association) deprived them of their due process right to impartial review of the initial adverse determination by Blue Cross Plan. In addition, as count three of their respective complaints, petitioner St. Louis University alleged that Blue Cross Plan denied it equal treatment under the law by disapproving payments that were allowed other providers who used a certain bookkeeping method acceptable to the Plan, and petitioner Faith Hospital Association claimed that recapture of the alleged overcharges was barred by the applicable limitations period.

At the time petitioners filed their complaints, the Medicare Act did not provide for judicial review of administrative determinations regarding provider reimbursement.[1] Petitioners consequently asserted jurisdiction under 28 U.S.C. 1331 and under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*

2. The case of St. Louis University came to conclusion first. District Judge Nangle dismissed the

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[1] Individual beneficiaries dissatisfied with a determination by the Secretary regarding either entitlement to reimbursement under Part A or Part B, or the amount of benefits under Part A, have consistently been entitled to judicial review under 42 U.S.C. (Supp. V) 1395ff(b). Providers, however, were initially entitled to judicial review only of determinations by the Secretary regarding eligibility to participate in the Medicare program. 42 U.S.C. 1395ff(c). By amendments applicable to cost reporting periods ending on or after June 30, 1973, Congress has provided for the establishment of a Provider Reimbursement Review Board to review claims such as those made by petitioners, and for judicial review of the Board's determinations. 42 U.S.C. (Supp. V) 1395*oo*(f).

statutory and equal protection claims on grounds of sovereign immunity. He upheld the University's claim regarding the composition of the Appeals Committee, however, and remanded the case to the Secretary "for a *de novo* evidentiary hearing before a tribunal that does not contain employees of" Blue Cross Association (No. 76-141, Pet. App. 8). Both the University and the Secretary appealed.

The court of appeals ruled that the district court had no jurisdiction over the University's statutory claim. It held that federal question jurisdiction under 28 U.S.C. 1331 was barred by 42 U.S.C. 405(h),[2] and that, even assuming that the Administrative Procedure Act constitutes a general grant of jurisdiction to review agency action, review could not be had under that Act since the agency action for which review was sought was "committed to agency discretion by law" within the meaning of 5 U.S.C. 701 (a)(2) (*id.* at 14-21).

The court of appeals held that 42 U.S.C. 405(h) did not deprive the courts of jurisdiction under 28 U.S.C. 1331 to review the University's due process claim, however, since to rule otherwise "would raise serious constitutional problems which might impair the force and effect of the Medicare Act" (*id.* at 24). It disagreed with the district court's ruling that the

[2] 42 U.S.C. 405(h) is incorporated into the Medicare Act by 42 U.S.C. 1395ii. It provides, in relevant part, that "[n]o action against the United States, the Secretary, or any officer or employee thereof shall be brought under [28 U.S.C. 1331] to recover on any claim arising under this subchapter."

composition of the Appeals Committee was constitutionally defective, but it held that the University had been denied due process by the Secretary's delegation to Blue Cross Association of final authority to interpret the Secretary's regulations under the Act. Accordingly, the court ordered the case remanded to the Secretary with instructions "to determine the University's contentions concerning the proper interpretation of the Medicare Act and regulations" and to hold a *de novo* hearing only if the Secretary deemed it helpful to that determination (*id.* at 25).

As to the University's equal protection claim, the court observed that it differed from the due process claim (which was collateral to the substantive issue of entitlement) in that its direct purpose was to increase the amount of reimbursement to the University. But the court declined to decide whether jurisdiction over that count was barred by 42 U.S.C. 405 (h), since that issue would become moot if upon remand the Secretary agreed with the University, and, even if he did not, and jurisdiction were subsequently found to exist, resolution of the University's claim on the merits would be facilitated by the Secretary's "authoritative construction of the regulations and articulation of their underlying rationale" (*id.* at 27). The district court's dismissal of the equal protection count accordingly was affirmed without prejudice to the University's ability to assert it again following the Secretary's determination on remand.

3. Faith Hospital Association's statutory and due process claims were disposed of by the district court (Wangelin, J.) (No. 76-105, Pet. App. 21-23) and the court of appeals (*id.* at 1-2) in the same manner as those of St. Louis University. In addition, the district court rejected the Association's claim that the Secretary's recovery of the overpayments was barred by any limitations period, and the court of appeals affirmed (*id.* at 2).

ARGUMENT

Petitioners contend that the court of appeals misconstrued both 42 U.S.C. 405(h) and the Administrative Procedure Act in ruling that there is no jurisdiction to hear nonconstitutional challenges to administrative determinations regarding pre-fiscal 1973 provider reimbursement claims.[3] They correctly observe that 42 U.S.C. 405(h), held to bar jurisdiction under 28 U.S.C. 1331 in *Weinberger* v. *Salfi*, 422 U.S. 749, has not been uniformly applied by the courts of appeals in cases where, unlike in *Salfi*, judicial review is not otherwise provided for under 42

[3] The Association has not sought review of the dismissal of its limitations claim, and St. Louis University has not sought review of its equal protection claim. Nor has either petitioner sought review of the ruling below that the Appeals Committee was properly constituted. The Secretary has not sought review of the court of appeals' ruling that he must review the Appeals Committee's adverse determination of petitioners' claims.

U.S.C. 405(g).[4] And they say, again in our view correctly, that the decisions below conflict with the decision of another court of appeals[5] over the question whether (apart from the issue of general federal-question jurisdiction, and on the assumption that there is jurisdiction under the Administrative Procedure Act) the agency action of which they complain is "committed to agency discretion" and hence unreviewable in any event.

The present cases, however, are unsuitable for resolution of these conflicts, for petitioners' claims are not yet ripe for review. The gravamen of petitioners' complaints is that Blue Cross Association has erroneously determined that they overcharged the Secretary for Part B services under the Medicare Act. That determination is still subject to final administrative review under the order of the court of appeals remanding to the Secretary with instructions "to determine [petitioners'] contentions concerning the proper interpretation of the Medicare Act and

[4] Compare the decision below with *Whitecliff, Inc.* v. *United States*, 536 F.2d 347 (Ct. Cl.) (No. 76-141, Pet. App. 33-43) (holding that 42 U.S.C. 405(h) limits judicial review only when the Social Security Act otherwise provides for review); *Dr. John T. MacDonald Foundation, Inc.* v. *Mathews*, 534 F.2d 633, 636 n. 6 (C.A. 5) (raising but not deciding the question whether "jurisdiction under § 1331 survives *Salfi*"); and *South Windsor Convalescent Home, Inc.* v. *Mathews*, C.A. 2, No. 75-6136, decided July 27, 1976 (*semble*).

[5] *Rothman* v. *Hospital Service of Southern California*, 510 F.2d 956, 958 (C.A. 9).

regulations" (No. 76-141, Pet. App. 25). If, upon remand, the Secretary agrees with petitioners' contentions, the jurisdictional issues they now raise will have become moot. If, on the other hand, the Secretary upholds Blue Cross Association's determination, petitioners may then seek judicial review of the Secretary's decision in a single action raising both their jurisdictional contentions and their statutory claims on the merits.[6] Given the possibility that the Secretary will decide petitioners' substantive contentions in their favor, however, review of the jurisdictional issues presented by the petitions would be premature at this stage.[7]

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[6] *Mathews* v. *Sanders*, No. 75-1443, certiorari granted, June 1, 1976, presents issues similar to those presented here. One question presented in that case is whether nonstatutory review of Social Security Act claims is available under the APA despite the apparent bar of 42 U.S.C. 405(h). If this Court reaches that question and holds that APA review is unavailable (either because 42 U.S.C. 405(h) forbids it or because the APA is not jurisdictional) petitioners' jurisdictional contentions would appear to be foreclosed. Even if the Court holds that APA review is available, petitioners' cases will not necessarily be affected, in light of the ruling below that the administrative determination of petitioners' claims for reimbursement is unreviewable under that Act because "committed to agency discretion," an issue specific to this case that could not be decided in *Sanders*. In view of these considerations, and in light of the fact that petitioners may secure full relief upon remand to the Secretary, these petitions need not be held pending disposition of *Sanders*.

[7] Both petitioners assert (No. 76-105 p. 14; No. 76-141 pp. 11-12 n. 7) that the amendments to the Act providing for judicial review of post-1973 claims such as petitioners' (see note 1, *supra*) do not lessen the importance of their cases, which, they say, are typical of numerous others involving "many millions of dollars." If petitioners are correct (a matter into which the Secretary is now inquiring), then the Secretary may wish to seek Supreme Court review of *Whitecliff, Inc.* v. *Mathews*, *supra*, and *South Windsor Convalescent Home, Inc.* v. *Mathews*, *supra*, which permit cases such as these to be brought in the Court of Claims. But even if review is ultimately sought in those cases, petitioners would not be prejudiced by denial of their petitions since, as stated in the text, their contentions may become moot upon remand to the Secretary and, if not, they will have a subsequent opportunity to avail themselves of any intervening decision by this Court favorable to their position.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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